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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972
No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

-vs-

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

BRIEF OF *AMICUS CURIAE* (STATE OF FLORIDA) IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

The Capitol Bldg.
Tallahassee, Florida

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PRELIMINARY STATEMENT

Comes now the State of Florida, by and through its Attorney General, and files its brief *Amicus Curiae* in the above-styled cause on behalf of Petitioner.

Amicus adopts *in toto* the position taken by Petitioner in the brief heretofore filed in this Court, and in addition thereto advances additional matters

demonstrating the existence of several substantial federal questions which only this Court can authoritatively resolve.

REASON FOR GRANTING WRIT

The Decision Below Is Erroneous In That It Holds That The Fourth And Fourteenth Amendments To The Constitution of The United States Require A State To Provide Preliminary Hearings Before Judicial Officers For All Defendants Incarcerated Awaiting Trial Upon Informations Filed By A State Attorney And Thus Presents An Important Question Of Federal Constitutional Law And The Decision Conflicts With Applicable Florida Law And With The Decisions Of This Court And Of Other Courts Of Appeal.

The United States Court of Appeals, as well as the District Court, held that the Fourth and Fourteenth Amendments affirmatively require that arrestees held for trial upon informations filed by the state attorney must be afforded preliminary hearings before a judicial officer without unnecessary delay, in effect declaring Rule 3.131(a), Florida Rules of Criminal Procedure, unconstitutional, for said Rule dispenses with preliminary hearings to a defendant charged in an

information or indictment, subsection (b) seemingly to the contrary notwithstanding.

The State of Florida respectfully suggests that such a ruling clearly presents a substantial federal question for the ruling directly affects the entire criminal justice system of the State of Florida. *Amicus* adopts the argument advanced by Petitioner on pages 7 through 13, as clearly presenting the conflict between the case *sub judice* and the cases heretofore decided by this Court.

There is another reason why this Court should treat the issue as one of federal importance, and that is that the decision of the Court of Appeals, if allowed to stand, would have the effect of negating the Rules of this very Court as amended in 1972. Indeed, Rule 3.131(a) was framed in light of this Court's Rule 5, Federal Rules of Criminal Procedure, subsection (c) of which provides:

> "(c) Offenses Not Triable by the United States Magistrate.
>
> * * *
>
> "A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the

> defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. * * *." [Emphasis Supplied]

The underscored portion of this Court's rule makes it clear beyond any doubt that if he is indicted or informed against prior to the scheduled date of the preliminary examination, said examination is dispensed with. That is exactly what Rule 3.131(a), Florida Rules of Criminal Procedure, does. Subsection (b) is inapplicable when either of those two events occur; a fact the Court of Appeals either overlooked or misunderstood.

The State of Florida is curious to know how it can be said that Florida's rules dispensing with the preliminary hearing violate the fundamental concepts of the Fourth and Fourteenth Amendments to the United States Constitution, when they do no more than what the Federal Rules of Criminal Procedure do. This Court's decision in *Kaufman v. United States*, 394 U.S. 217 (1969), makes it quite clear that the constitutional rights of federal prisoners are as comprehensive as are those of state prisoners. What the Court of Appeals has in effect declared, is that the rules duly enacted by this Court violate the Fourth and Fourteenth Amendments of the United States Constitution. The State of Florida urges that that is most certainly a substantial federal question meriting resolution by this Court.

The lower courts both recognized the nonnecessity of a preliminary examination where an indictment is returned, thereby expressing an evaluation that there is a substantial difference between charges brought under that method and a charge brought pursuant to an information filed by the state attorney. It is the same state attorney who draws a direct information, that presents the evidence to the grand jury, advises them as to the various laws that might be involved, and in most cases makes the recommendation as

to whether they should or should not indict. Of course, no one would suggest that a non-unanimous group of lay persons comes even remotely close to a "judicial magistrate". If one cares to look at the two systems closely enough and in a realistic light, he will immediately perceive that there may be a distinction between the two in law, but there is virtually no difference in fact. We are told that, notwithstanding the superficial distinctions, somehow the Constitution is offended by denying an individual a preliminary hearing when he is charged by one method but not the other. *Amicus* submits that is an absurdity and that if we are truly concerned with having a judicial magistrate determine probable cause for a person being held in custody that it should apply no matter how the accused is charged. Moreover, it should matter not whether the charge be classified as capital, non-capital, misdemeanor or petty offense. That is truly the spirit and teaching of *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Indeed, this is exactly what the cross-petitioner is contending. While such a system would be desirable in a perfect world, unconcerned with the realities of a workable social order, this Court's rules obviously contemplate a more realistic criminal justice system.

The Court of Appeals misapprehended *Coolidge v. New Hampshire*, 403 U.S. 443, (1970) for that case dealt with the

issuance of a warrant to justify a seizure of property and this Court held such a warrant had to be issued by a neutral magistrate. *Coolidge* did not hold that subsequent to the siezure there had to be a preliminary examination to determine whether there was a basis to continue to hold the evidence. If the case *sub judice* was truly analogous to *Coolidge*, then the plaintiffs below would have been asserting that they could not be arrested except upon the issuance of a warrant by a judicial officer. Of course, they are not contending that because that is what this Court put to rest in *Ocampo v. U.S.*, 234 U.S. 91 (1914). The Court's reliance upon *Morrissey v. Brewer*, 408 U.S. 471 (1971) was equally misplaced for while this Court held a parolee was entitled to a prompt hearing to determine probable cause before someone not directly involved, this Court also made it patently clear that he need not be a judicial officer, just someone not directly involved with the parolee. That is precisely what the state attorney is! If one looks at *Morrissey* closely enough, it really supports the philosophy and rationale of Rule 3.131(a), Florida Rules of Criminal Procedure rather than undermining it.

Florida's amended Rules of Criminal Procedure, in its 24-hour first appearance Rule, its liberal bail procedures, and its mandatory speedy trial requirement, are all designed to promptly dis-

pose of criminal cases lodged against those accused of crimes. The Florida Supreme Court, like this Court, has seen fit to dispense with preliminary hearings when the accused is charged by an indictment or an information. The Circuit Court of Appeals, by declaring Rule 3.131(a) unconstitutional, has placed a cloud over the Federal Rules of Criminal Procedure. In doing so it has rendered an opinion which clearly raises substantial federal questions which should be decided by this Court.

* * *

Whether the decision of the Fifth Circuit Court of Appeals can invest a lesser tribunal (magistrate-county judge) with jurisdiction sufficient to disturb the custody of a defendant held in jail as a result of having been charged by information with a crime in Florida is what this Court must decide.

The Supreme Court of Florida is the final and unreviewable interpreter of Florida law and, with respect to matters of state law, the decisions of that court binds everyone. *Scripto, Inc. v. Carson*, 362 U.S. 207, 4 L.ed.2d 660, 80 S.Ct. 619; *Murdock v. Memphis*, 20 Wall. 590 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53; *Fox Film Corp. v. Muller*, 296 U.S. 207. As recently as 1964, this very Court in pursuance of Rule 4.61, Florida Appellate Rules, 31 F.S.A., requested of the Florida Supreme Court a decision by that tribunal regarding the

jurisdiction of the several courts involved in that case so that it could, in turn, determine whether matters pending before it should be disposed of in one as opposed to another fashion. *Dresner v. Tallahassee*, 375 U.S. 136, 11 L.ed2d 208, 84 S.Ct. 235. After having received the opinion of the Florida Supreme Court, the matters involved as to Dresner were dismissed by this Court in the following language:

> "PER CURIAM.
> The questions which this Court certified to the Supreme Court of Florida, 375 U.S. 136, 11 L.ed.2d 208, 84 S.Ct. 235, having been answered in the affirmative, 164 So.2d 208, the writ of certiorari is dismissed as improvidently granted. 28 USC § 1257." 378 U.S. 539, 12 L.ed.2d 1018, 84 S.Ct. 1895.

Again, this Court in *Callendar v. Florida*, 380 U.S. 519, 85 S.Ct. 1325, 14 L.ed.2d 265 (1965), and *Callendar v. Florida*, 383 U.S. 270, 15 L.ed.2d 749, 86 S.Ct. 924 (1966), recognized that it was bound by the Florida Supreme Court's determination regarding the jurisdiction of courts in Florida.

It follows that this Court has repeatedly recognized the exclusive authority

of the Florida Supreme Court to determine the jurisdiction of the several courts of the State of Florida. See *Dresner v. Tallahassee*, supra, and *Callendar v. State*, supra.

By operation of law (Article V, Section 2, Constitution of the State of Florida, see addendum at page 1307 through 1312 of Volume 3, Florida Statutes, 1971) the Florida Supreme Court is vested with the exclusive authority to promulgate rules and regulations regarding both jurisdiction and practice in the several courts of the state. It has adopted what is known as Florida Rules of Criminal Procedure, effective February 1, 1973, wherein the procedure to be followed with regard to arrestees is set out therein and in particular in Rules 3.120, 3.130 and 3.131.

That same Article V, Section 5, sets forth the jurisdiction of the circuit courts of the State of Florida, and Section 6 thereof sets forth the jurisdiction of the county courts. It may be easily noted that the circuit courts have jurisdiction of all matters not vested in the county courts.

When an individual is indicted or informed against in the State of Florida, those formal charges are routinely filed

with the clerk of the circuit court where the charge is brought, thereby vesting the circuit court with jurisdiction of the accused and the subject matter until such time as the issues have been disposed of. Obviously the circuit court has jurisdiction to dispose of all matters relating to that formal charge and in so doing is reviewable on appeal as a matter of right to the appropriate district court of appeal or to the Florida Supreme Court as the case may be.

The criminal jurisdiction of the county court is limited to misdemeanors. Accordingly, they are in the judicial structure of the State of Florida a lesser tribunal--in short they are Florida's magistrates much as the former United States Commissioners are now federal magistrates. In that posture their jurisdiction no more permits them to invade the province of the circuit court regarding the custody of an accused against whom an information has been filed than would a federal magistrate invate the province of a Federal District Court once an accused has been informed against. Only the circuit court or a district court of appeal or the Florida Supreme Court, or conceivably this Court, has authority to alter the custody of an individual so confined.

By ruling as it did in the decision below, the Court of Appeals purported to vest the several magistrates (county

judges) in Florida with jurisdiction to review an accused's custody ostensibly on the theory of a preliminary hearing. The net effect of this is to permit (by dint of an impossible judicial fiat) Florida's lowest court to override the authority of a Florida circuit court, even to the point of ordering the release of an accused theretofore controlled only by the circuit court or by the other courts above it mentioned previously. The Florida Supreme Court has never vested magistrates with that kind of authority--they do not have it--and they cannot be given it, however desirable that conclusion may appear to the Court of Appeal below.

CONCLUSION

For these reasons, *Amicus* respectfully urges this Court to grant certiorari and reverse the holding of the Court of Appeals in and for the Fifth Circuit.

Respectfully submitted:

ROBERT L. SHEVIN
ATTORNEY GENERAL

By _____
Raymond L. Marky
Assistant Attorney
General

And:

By _____
George R. Georgieff
Assistant Attorney
General

The Capitol Building
Tallahassee, Florida

Counsel for Amicus Curiae

* * *

CERTIFICATE OF SERVICE

I, GEORGE R. GEORGIEFF, Counsel for *Amicus Curiae*, and a member of the Bar of the United States, hereby certify that on the _____ day of October, 1973, I served copies of the Brief of *Amicus Curiae* on Bruce Rogow, Esquire, 733 City National Bank Building, Miami, Florida, and Phillip A. Hubbart, Esquire, Counsel for Respondents; and Peter L. Nimkoff, Esquire, Suite 607 Ainsley Building, 14 N.E. First Avenue, Miami, Florida, and Lewis Jepeway, Jr., Esquire, 101 E. Flagler Street, Miami, Florida, by a duly addressed envelope with postage prepaid.

George R. Georgieff
Assistant Attorney
General